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No. 702

IN THE

Supreme Court of the United States

DECEMBER TERM, 1963

JOSEPH GALLOWAY,

Petitioner.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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INDEX

	PAGE
Opinion below	2
Jurisdiction	2
Statutory provision believed to confer jurisdiction	2
Question presented for review	2
Constitutional provision involved	3
Statement of the case	4
Reasons for granting writ	5
Conclusion	8
Certificate of service	9
Appendix	11-17

AUTHORITIES

Cases

Fiske v. Kansas, 274 U.S. 380, 385; 71 L.ed. 1108,1111; 380 S.Ct. 387	7
Re Sawyer, 360 U.S. 622, 628; 3 L.ed. 2d 1473, 1479; 79 S.Ct. 1376	7
Wood v. Georgia, 370 U.S. 375, 386; 8 L.ed. 2d 569, 578; 82 S.Ct. 1364	7

Miscellaneous

The Fourteenth Amendment to the Constitution of the United States	3
Title 28, Section 1257 (3), U.S.C.A.	2

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court:

Now comes Joseph Galloway, petitioner, defendant in error below, by his duly authorized attorneys, Julius L. Sherwin and Theodore R. Sherwin, and prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered on May 27, 1963 (R. 11), rehearing denied September 26, 1963 (R. 14).

In support of this petition, your petitioner respectfully shows:

OPINION BELOW

The Criminal Court of Cook County did not prepare or publish an opinion. The opinion of the Supreme Court of Illinois is reported in 28 Illinois 2nd 355; 192 N.E. 2d 370.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on May 27, 1963 (R. 11). A petition for rehearing was denied on September 26, 1963 (R. 14). No order staying the mandate herein was sought by petitioner.

STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION.

This Court's jurisdiction is invoked pursuant to Title 28, Section 1257, Subsection (3), U. S. C. A.

THE QUESTION PRESENTED FOR REVIEW.

The question presented for review is whether the Petitioner was denied due process of law and equal protection of the laws, contrary to his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, where a State Court affirms a conviction for the crime of unlawful possession of narcotic drugs, where the record is without evidence to support such affirmance; where the Court in its opinion states that the record contains neither direct proof of knowledge on the part of the Defendant of the presence of said drugs on the premises where said drugs were found, nor proof of actual physical possession of said drugs by the Defendant.

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved is found in Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Petitioner, Joseph Galloway was indicted in a single count charging possession of a narcotic drug. The only evidence introduced to support the charge was a manila coin envelope, containing 4½ grams of white powder of which approximately only 7/10 of one per cent was heroin hydrochloride (R. 3; Abst. 35, 37). Said manila coin envelope was found stuck down into a quantity of paper, envelopes and mail in a dresser drawer, all the property of the Defendant's wife who put them there (R. 3; Abst. 42). The dresser was in the front bedroom of an apartment occupied exclusively by said wife and three minor children—she being separated from the Defendant who lived elsewhere (R. 3; Abst. 44).

At the time of the search of the apartment, the Defendant was in the bathroom clad only in shorts. He didn't have a bathroom where he lived and had come to his wife's apartment to take a bath (R. 3; Abst. 47). Nothing was found in the physical possession of the Defendant (R. 3; Abst. 22). The Defendant denied ownership of the manila envelope (R. 3; Abst. 26, 43, 50) and there was no evidence in the entire record of any knowledge on the part of the Defendant of the presence in the apartment of the manila coin envelope and its contents.

REASONS FOR GRANTING WRIT

Where the record is without evidence to support the affirmance of a conviction for the crime of possession of a narcotic drug this Court should grant certiorari to permit it to examine the evidence and determine whether the Petitioner was thereby deprived of his liberty contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

On the afternoon of December 1, 1960, five Illinois narcotic investigators were admitted by petitioner's wife to the third floor apartment at 6359 Stewart Avenue, Chicago (R. 3; Abst. 10), occupied by her and their three minor children. Present in the apartment were petitioner's wife, a lady visitor who was in the living room (R. 3; Abst. 12), the three minor children (R. 3; Abst. 42) and petitioner who was clad only in a pair of shorts (R. 3; Abst. 10) and was in the bathroom, gargling, at the time of his arrest. Nothing was found in the physical possession of petitioner at anytime. (R. 3; Abst. 22).

A thorough search of the apartment by the five investigators, ensued (R. 3; Abst. 22). Inspector Norton searched a chest [dresser] in the front bedroom of the apartment and testified that he found a manila coin envelope containing white powder, stuck down in a quantity of miscellaneous envelopes and papers of various sizes. He testified that he showed the manila coin envelope to petitioner and asked him if it was his and petitioner denied ownership. Petitioner said, "No, it wasn't [his]". (R. 3; Abst. 26). It was determined that the white powder weighed approximately 4½ grams, of which the minimal amount of 7/10 of one per cent was a narcotic substance, heroin hydrochloride. (R. 3; Abst. 35, 37).

For a period of approximately one year, prior to the arrest, petitioner had been separated from his wife. He

never lived at the Stewart Avenue apartment. (R. 3; Abst. 44). On the day of the arrest petitioner had come to the Stewart Avenue apartment to take a bath because there was no bath in the one-room apartment where he lived. Prior thereto he came there from time to time to visit with his wife and children. His money and personal papers were kept there by his wife. He stated that the reason he didn't keep his money in a bank was because his mother once lost some money in a bank and he didn't trust banks. (R. 3; Abst. 47-48).

At the time of the search, the third adult - a woman variously identified as Mrs. Brown, (R. 3; Abst. 13, 21) Dorothy Files, (R. 3; Abst. 41) or Mrs. Styles, (R. 3; Abst. 66) - was not questioned by the investigators concerning the white powder. She was permitted to leave the apartment following a brief conversation with Stribling one of the investigators. (R. 3; Abst. 12, 21). Inspector Stribling denied that she was an undercover employee of his department, or that she had been hired for the purpose of obtaining information to transmit to his department. She was not, however, called as a witness by the People. Stribling testified that he did not know her whereabouts at the time of the trial, nor did he make any effort to find her from the time of arrest of petitioner to the time of the trial. (R. 3; Abst. 21-22), though he had ascertained her address before he permitted her to leave the apartment. (R. 3; Abst. 24).

In its opinion the Supreme Court of Illinois states:

> "The record before us contains neither direct proof of knowledge, nor proof of actual physical possession of narcotic drugs by defendant and it is his contention that there is no proof which permits, beyond a reasonable doubt, either an inference of knowledge or a finding of constructive possession." (R. 6; Appendix 13).

Said Court then predicates its affirmance on a supposed conflict in the evidence from which it states conclusions and inferences might be drawn by the jury depending upon which witnesses it chose to believe.

From a reading of the record in the case there appears however no evidence to support that Court's finding of constructive possession of the apartment where the narcotics were found. Proceeding from this unfounded inference of constructive possession said Court proceeds to the equally unfounded inference of knowledge by the petitioner of the presence in the apartment of the nracotics.

In Re Sawyer, 360 U.S. 622, 628; 3 L. ed 2d 1473, 1479; 79 S. Ct. 1376 this Court said:

> "Speculation cannot take over where the proofs fail."

This Court further said:

> "The fact finding below does not remove this Court's duty of examining the evidence to see whether it furnishes a rational basis for the characterization put upon it by the lower courts." See *Fiske* v. *Kansas*, 274 U.S. 380, 71 L. ed 1108, 47 S. Ct. 655."

In *Wood* v. *Georgia*, 370 U.S. 375, 386; 8 L. ed 2d 569, 578; 82 S. Ct. 1364, this Court said:

> "But state courts may not preclude us from our responsibility to 'examine the evidence to see whether it furnishes a rational basis for the characterization put on it'." (Citing *Re Sawyer*, *supra*).

To the same effect is this Court's decision in *Fiske* v. *Kansas*, 274 U.S. 380, 385; 71 L. ed 1108, 1111; 380 S. Ct. 387.

In view of the foregoing applicable decisions of this Court in the light of the absence in the record below of evidence to support the affirmance of the convictions by the Supreme Court of Illinois, it is respectfully submitted

that the writ of certiorari should be granted to review said decision. Otherwise, the petitioner will have been deprived of his liberty contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION.

Wherefore, petitioner prays for the allowance of a writ of certiorari to the Supreme Court of Illinois in the case entitled "*The People of the State of Illinois, Plaintiff, Defendant in Error* v. *Joseph Galloway, Defendant, Plaintiff in Error*, No. 37617," in order that said case may be reviewed and determined by this Honorable Court.

Respectfully submitted,

JULIUS L. SHERWIN,
THEODORE R. SHERWIN,
77 W. Washington Street,
Chicago 2, Illinois,
Attorneys for Petitioner.

Dated: December 24, 1963.

APPEARANCE

We, Julius L. Sherwin and Theodore R. Sherwin, members of the bar of the Supreme Court of the United States, do hereby enter our appearance for Joseph Galloway, Petitioner.

.....
Julius L. Sherwin

.....
Theodore R. Sherwin,
77 W. Washington Street,
Chicago 2, Illinois.

CERTIFICATE OF SERVICE

I, Julius L. Sherwin, an attorney of record for Joseph Galloway, petitioner herein, depose and say that on the 24th day of December, 1963, I served a copy of the foregoing petition, by mailing the same, with first class postage prepaid, to the following counsel of record:

William G. Clark, Esq.
Supreme Court Building,
Springfield, Illinois,
Attorney General of Illinois.

Daniel P. Ward, Esq.
Cook County Criminal Courthouse,
2600 S. California Avenue,
Chicago 8, Illinois,
State's Attorney of Cook County, Illinois

Julius L. Sherwin

Subscribed and sworn to before me, at Chicago, Illinois, this 24th day of December, 1963.

Notary Public

My Commission Expires April 20, 1967.

APPENDIX

OPINION OF THE SUPREME COURT OF ILLINOIS

Mr. Justice Daily delivered the opinion of the court:

This writ of error is prosecuted by defendant, Joseph Galloway, who was sentenced to the penitentiary for a term of five to eight years after a jury in the criminal court of Cook County had found him guilty of unlawfully possessing narcotic drugs. Seeking reversal, he contends that he was not proved guilty beyond a reasonable doubt, that the prosecutor made unfair and prejudicial remarks in the presence of the jury, that improper evidence was admitted, and that the jury was improperly instructed.

Shortly after 1:00 P.M. on December 1, 1960, five narcotics investigators employed by the State of Illinois, having obtained a search warrant, were admitted to an apartment located at 6359 S. Stewart Avenue in Chicago. Upon their entry defendant was found in the bathroom, clad only in shorts, while his wife and a woman named Dorothy Files were in a front room. Also present were defendant's children aged 4, 2 and 1 years. After reading the search warrant the officers started a systematic search of the apartment and one found a sifter, measuring spoons and a pie tin in a paper sack on a kitchen shelf. As the result of both search and voluntary disclosure by defendant it was also discovered that there was approximately $4000 secreted in various parts of the apartment. Another officer found in a bedroom dresser drawer a small coin envelope containing a white powder. This envelope was in a packet of letters and papers some of which were ad-

dressed to and belonged to the defendant. A field test of the powder disclosed that it was a derivative of opium and a subsequent chemical analysis established that it was a mixture of heroin and milk sugar. Defendant was confronted with the discovery and, according to one officer, dropped his head and made no reply when asked if the envelope was his. Another officer testified that defendant denied ownership of the envelope in reply to a question asked by said officer. The defendant's wife, in response to a similar question, denied that it was hers or that she had ever seen it before. Dorothy Files who was visiting the wife, was questioned briefly and permitted to leave, after which defendant was placed under arrest.

To support a conviction of the crime of unlawful possession of narcotic drugs the People must prove not only that the accused had knowledge of the presence of the narcotics, but also that they were in his immediate possession and control. (*People* v. *Smith*, 20 Ill. 2d 345; *People* v. *Matthews*, 18 Ill. 2d 164.) At the same time, however, we have adopted the view that actual physical possession is not required to be proved, it being sufficient if constructive possession is established, and further, because the element of knowledge is seldom susceptible of direct proof, have held that knowledge may be proved by evidence of acts, declarations or conduct of the accused from which it may be fairly inferred that he knew of the existence of the narcotics at the place where they were found. (*People* v. *Embry*, 20 Ill. 2d 331; *People* v. *Mack*, 12 Ill. 2d 151.) In particular, in cases such as we have here, it is our view that "where narcotics are found on the premises under the control of defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts and circumstances

which might leave in the mind of the jury * * * a reasonable doubt as to his guilt.'' (*People* v. *Nettles*, 23 Ill. 2d 306, 308-309.) Whether there is possession and whether there is knowledge are both questions of fact to be determined by the jury, or by the court where a jury is waived, and, as in the case of other factual determinations committed to a jury in criminal proceedings, its findings will not be disturbed on review unless the evidence is so palpably contrary to the verdict, or so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of guilt. *People* v. *Mack*, 12 Ill. 2d 151.

The record before us contains neither direct proof of knowledge, nor proof of actual physical possession by defendant, and it is his contention that there is no proof which permits, beyond a reasonable doubt, either an inference of knowledge or a finding of constructive possession. We find, however, not a lack of evidence, but merely a conflict in evidence, and that the conclusions and inferences to be drawn therefrom rest completely upon which witnesses the jury chose to believe.

Defendant, supported by his wife, testified that he did not live in the apartment at the time of the search, but that he resided in a single room at 6501 S. Wentworth Avenue. In substance, it was their further testimony that they had lived separate and apart for about six months prior to the date of defendant's arrest; that defendant came to his wife's apartment from time to time to visit the children, to take a bath and to count his money; that he received his mail there; that he kept no clothing there; and that defendant paid the expenses of the apartment. Explaining the presence of the large sum of money and his personal papers found in the apartment, defendant testified that he did not trust banks and that his valuables were not safe at

the place where he roomed. In connection with his possession of $4000 it was brought out on cross-examination that defendant was unemployed and drawing compensation of $30 a week at the time of arrest, and that prior to his unemployment he had worked for two years as a liquor store clerk for a salary of $70 a week.

As opposed to the defense testimony, officers who participated in the search testified that they had found a large quantity of men's clothing in the apartment, as well as the money, mail and personal papers admittedly belonging to defendant, that it appeared defendant and his wife occupied the same bedroom, and that defendant, when furnishing information for an arrest report, had given his address at 6359 S. Stewart Avenue.

Considering the People's evidence and the frailties and improbabilities inherent in the testimony of defendant and his wife, we are of the opinion there is credible evidence from which the jury could with reason conclude that the premises upon which the narcotics were found were under the control of defendant. The same evidence gives rise to an inference of knowledge and possession which, under the circumstances of the case, is sufficient to establish his guilt beyond a reasonable doubt.

During his opening statement the prosecutor referred to the large sum of money found in the apartment and, during the trial, witnesses were also permitted to testify concerning the money over defendant's objections. It is contended here, as it was below, that all of these references to the money were improper as tending to show defendant guilty of a crime, (*viz.*, the sale of narcotics,) other than the crime for which he was being tried. We see no merit to this contention. While it would be enough to say that defendant waived his objections by going into the matter

of the money during his own direct examination, (see: Cleary, Handbook of Illinois Evidence, sec. 1.14,) we agree with the trial court that such evidence was relevant to the issue of defendant's control over the apartment. The test of admissibility of evidence is whether it fairly tends to prove the particular offense charged and any circumstances may be put in evidence which tend to make the proposition at issue either more or less probable. (*People* v. *Allen*, 17 Ill.2d 55, 63.) Further, even if it be assumed the refences to the money suggested to the jury the crime of selling narcotics, in a criminal case, where evidence is relevant and otherwise admissible, it is not to be excluded because it may also have a tendency to prejudice the accused. *People* v. *Jackson*, 22 Ill.2d 382, 391.

The flour sifter, measuring spoons and pie tin found in a sack in the apartment kitchen were offered into evidence by the prosecution but were denied admission because there had been no connecting proof to establish that they had been used as narcotics paraphernalia. Defendant contends now that the testimony of the People's witnesses concerning these items and their exhibition before the jury was prejudicial error. We do not find, however, that objection was ever made to the testimony of the witnesses now complained about and, moreover, defendant's cross-examination of the witnesses brought out to the jury that the items were ordinary household utensils to which no criminal significance could be attached. Under the circumstances, we cannot say that prejudicial or reversible error occurred.

A Chicago police officer, George H. Smith, was called as a rebuttal witness by the prosecution to testify as to defendant's reputation for truth and veracity. And while defendant now makes varied attacks on his testimony and

competency, we find that the single contention properly preserved for review by defendant's written motion for a new trial, (See *People* v. *Hunter*, 23 Ill.2d 177; *People* v. *Flynn*, 8 Ill.2d 116,) is whether prejudicial error occurred when the witness, after being asked on cross-examination the date he had first met defendant, responded: "I would have to look at the records. This was some time ago." Upon objection by defendant, and after denying a motion for a mistrial, the court instructed the jury to disregard the answer of the witness and to erase it from their minds. While we agree that the answer was unresponsive, we are not in accord with defendant's contention that it constituted evidence of a distinct and substantive offense other than the one for which he was being tried. At best it could have done no more than to create an inference that defendant had a police record, and under the circumstances which show that the response was prompted to a degree by the insistence of defendant's counsel that the witness fix the exact date on which he had first met the accused, we are of the opinion that reversible error and prejudice were averted by the court's prompt and timely admonition to the jury.

During final argument to the jury, defendant's counsel commented upon the charge and the evidence, and then stated: "* * * this is what they have to prove beyond a reasonable doubt before you can send him from the bar of the court to wherever he may be committed." At this the prosecutor objected, saying: "Objection, inasmuch as the offense is probationable,", but such objection was overruled by the court. Defendant made a motion for a mistrial, which was denied, and it is contended that this ruling was reversible error. Although several decisions of this court

have found it to be serious error for the prosecutor to discuss the possibility of probation in his argument to the jury, (*People* v. *Burgard*, 377 Ill. 322, 330-331; *People* v. *Klapperich*, 370 Ill. 588, 594; *People* v. *Isbell*, 363 Ill. 264, 269,) it is our opinion that those decisions do not have controlling application here since the subject was injected by way of objection rather than argument. Where, as in the present case, the jury has nothing to do with fixing the punishment, we have held that it is improper for either side in a criminal case to argue the punitive effect of the jury's verdict. (*People* v. *Klapperich*, 370 Ill. 588, 594; *People* v. *Panczko*, 20 Ill.2d 86, 88.) It was defense counsel who first referred to commitment, thus provoking the objection, and we are loathe to say that reversible error occurred, particularly since the trial court promptly overruled the prosecutor's objection.

Complaint is next made that the court erred in giving People's instruction No. 10, which read: "The Court instructs the jury in the language of the statute that it is unlawful for any person to possess, have under his control, or compound any narcotic drugs except as authorized in the Uniform Narcotic Drug Act." Defendant contends, first, that there was no evidence that he possessed or controlled narcotics, and, second, that so much of the instruction as relates to the compounding of a narcotic drug was misleading and improper, in that it suggested a separate and distinct crime for which there was no support in the proof. What has already been said concerning the sufficiency of the evidence to establish the necessary knowledge and possession disposes of the first contention, and it is our opinion that the remaining contention is equally without merit. The instruction defines the offense of unlawful possession in the language of the statute and, un-

questionably, includes a reference to the crime of compounding a narcotic drug which was not applicable to the facts in this case. However, as pointed out in *People* v. *Lyons*, 4 Ill.2d 396, and *People* v. *Kessler*, 333 Ill. 451, it is not necessarily error to give such an instruction, and whether or not an instruction in the language of a statute is misleading depends upon the facts and circumstances of the particular case. Here, the other instructions given to the jury, and the verdict returned, make it obvious that the jurors were in no manner misled by this instruction.

Our review of the record satisfies us that defendant's guilt was proved beyond a reasonable doubt, and that he received a fair trial, free from prejudicial error. Accordingly, the judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.